

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

ARRION LEE CREW, JR.,

Defendant and Appellant.

E053522

(Super.Ct.No. RIF139980)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge.  
(Retired judge of the Tulare Super. Ct., assigned by the Chief Justice pursuant to art. VI,  
§ 6 of the Cal. Const.) Modified and affirmed with directions.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Kelley Johnson, Deputy Attorney  
General, for Plaintiff and Respondent.

Defendant and appellant Arrion Lee Crew, Jr., appeals his conviction on two counts of first degree murder with the special circumstance of multiple murder. We will affirm the judgment.

### PROCEDURAL HISTORY

Defendant was charged with two counts of first degree murder (counts 1 & 2) and one count of possession of a firearm by a convicted felon (count 3). (Pen. Code, §§ 187, subd. (a), former 12021, subd. (a)(1).)<sup>1</sup> The information alleged personal discharge of a firearm (§ 12022.53, subd. (d)) as to both murder counts, and alleged the special circumstance of multiple murder as to count 2 (§ 190.2, subd. (a)(3)). The prosecution did not seek the death penalty.

A jury convicted defendant on all three counts and found the special circumstance allegation and the firearm allegations true.

The court sentenced defendant to life without the possibility of parole for the multiple murder special circumstance, with consecutive terms of 25 years to life on both count 1 and count 2, plus consecutive terms of 25 years to life on counts 1 and 2 for the firearm discharge enhancements, and a concurrent term of three years on count 3.

Defendant filed a timely notice of appeal.

---

<sup>1</sup> All further statutory references will be to the Penal Code unless otherwise indicated.

## FACTS

Kimberly Harris, the victim in count 2, known as “Cozy,” lived in Moreno Valley with her 18-year-old son Arthur and two younger sons. Her friend, Raquel Reliford Robinson, the victim in count 1, also lived with Harris.<sup>2</sup> All five were at home on the night of October 22, 2007. Two of Arthur’s friends were spending the night as well. Harris’s friend Ramona Williams, also known as “Bons” or “Bonswi,” was also at the house. Harris, Robinson and Williams often got together to “party,” drinking alcohol and using drugs, specifically “weed” and cocaine. Defendant, known as “E,” was Harris and Robinson’s drug dealer. Robinson regularly bought approximately \$150 worth of drugs from him, and Harris regularly bought \$80 worth of drugs from him.

Around 10:00 p.m., defendant and “some other guy” came to Harris’s house. After the two men left, Harris and Robinson told Williams that “something went down” with defendant and defendant “ha[d] to bring them back some money.” Williams later learned that Robinson had paid defendant \$100 for some drugs, and defendant owed her \$20 in change. Robinson had been drinking and was “all hyped up” and saying that defendant owed her \$20. Robinson kept calling defendant and making unspecified threats, as well as telling him that she was going to get her husband and some other people to beat him up. Robinson kept calling defendant “cuz.” Williams testified that she thought defendant might be a “Blood ex-gangbanger.” If he was, calling him “cuz”

---

<sup>2</sup> During the trial, Raquel Robinson was at times referred to as Raquel Reliford. We will refer to her as “Robinson.”

would be insulting, because that is a term Crips use to refer to one another. She did not know whether defendant was a Blood, however.

Over the course of the evening, Robinson drank about a pint of cognac. She was intoxicated,<sup>3</sup> and was very agitated about the \$20 defendant owed her. Harris repeatedly tried to calm her down.

Around 4:00 a.m., Arthur was awakened by voices outside the house, near his bedroom. He looked out the window and saw his mother and Robinson standing on the driveway. Robinson was asking his mother for money, but his mother refused to give it to her. His mother went inside the house, while Robinson approached defendant, who was standing nearby, next to his white SUV. The conversation went on for a few minutes. At one point, defendant became upset and walked away while Robinson was still talking to him. Robinson grabbed defendant by the shoulder. He shrugged her off and said, “Bitch, get the fuck off me.” He got into the SUV and drove away.

Around 6:00 a.m., defendant knocked at the outside door to Harris’s bedroom. Williams answered the door and saw defendant and his girlfriend. Both were wearing “hoodies” with the hoods pulled up over their heads. Defendant said, “I thought you was coming to pick up this money,” and that he had come to pay Robinson the \$20. Harris told Williams to let them in.

---

<sup>3</sup> Toxicology results showed that at the time of her death, Robinson’s blood alcohol level was 0.22.

Robinson and Williams were seated in chairs near Harris's bed, and Harris was lying on her bed with her feet at the head of the bed.<sup>4</sup> Defendant asked why they were "blowing [his] phone up," meaning why were they calling him so much. Robinson replied, "I'm calling you for my money." Defendant said that he was going to bring it by, but that Robinson could have come to pick it up, or could have sent someone to pick it up. At that point, the conversation was "fine." Defendant was calm and was not disrespectful.

At some point during the conversation, Robinson jumped up and became confrontational, saying, "I just need you to pay my money, cuz." Williams jumped in between them and attempted to calm Robinson down. Harris also told Robinson to calm down. Defendant just stood there with his hands in his pockets. Robinson eventually sat back down.

Defendant asked Harris how she could allow Robinson to talk to him like that, "disrespecting" him in her home. Robinson jumped up again and charged toward defendant. Williams again inserted herself between them, putting a hand on each of their chests to keep them separated. She told defendant that Robinson was drunk, and asked him just to leave. But Robinson said, "He's not going nowhere. He still ain't paid me my money." She kept calling him "cuz" and threatening to "do this and that" to him. She kept trying to jump over Williams to get to defendant.

---

<sup>4</sup> Harris, who weighed 378 pounds, spent most of her time in bed.

Harris kept telling Robinson to sit down, but Robinson would not listen. She became combative with Williams, and Williams had difficulty keeping her from defendant.<sup>5</sup> Defendant backed away from them as far as he could, and Robinson lunged toward him, reaching toward him with her right hand. Her hand was open, but she had something in her left hand. Williams thought it was her cell phone. As Robinson reached toward defendant, defendant pulled two guns out of his pockets and shot Robinson “point blank.” Williams heard about eight gunshots.

Williams was “surprised” when defendant pulled out the guns. She did not view the situation as “life or death,” and she did not anticipate it at all.

Thinking that she herself had been shot, Williams fled. As she was leaving the room, she saw defendant approach Harris and say angrily, “You letting her talk to me like this in your house?” She then heard eight more gunshots. According to Williams, Harris never left her bed during the incident. Williams saw defendant and his girlfriend run out of the house, down the driveway and to the street.

Arthur was awakened by the gunshots. He heard four gunshots separated by a second or two. He opened his bedroom door and saw Williams running down the hall. He asked, “Is my mom shot?” Williams said she didn’t know and told him to call 911. She then ran out the front door and disappeared.

---

<sup>5</sup> Robinson was also a large woman, weighing 270-275 pounds. She outweighed Williams by about 100 pounds.

Arthur entered his mother's bedroom and found both of them injured but apparently still alive. He called 911. When sheriff's deputies arrived, they found Robinson on the floor at the foot of the bed. Harris was face down on the bed with her feet at the head of the bed. She was bleeding from her ear, and there was a pool of blood on the bed. Paramedics arrived shortly thereafter and pronounced both women dead.

Three Winchester .45-caliber bullet casings were found near Robinson's body. All three were fired from the same gun. A pair of scissors was found close to Robinson's right hand, and a carpet knife or box cutter, in an open position, was found in or near Robinson's left hand. Robinson had two gunshot wounds, including a fatal wound to her chest and a wound to her abdomen. The bullets entered from the front of her body. The trajectories were consistent with Robinson leaning forward when she was shot. Harris had a gunshot wound to the head, apparently fired from close range, and a gunshot wound to her thigh.

Blood samples taken from both women during the autopsy tested positive for cocaine. Robinson's blood alcohol content was 0.22.

The day after the shooting (October 24, 2007), Shawn Sinclair, the manager of the apartment complex where defendant lived, noticed that defendant's door was standing open. He knocked but received no answer. He went inside and saw that the apartment appeared to have been "went through." He saw bullets on the floor and .45-caliber bullets on a table. Near the complex's Dumpster, he found a magazine that contained

nine Winchester .45-caliber rounds. He called the police and gave them the magazine. The rounds in the magazine matched the casings found in Harris's bedroom.

The next day (October 25, 2007), defendant's mother, Troylyn Gammage, came to defendant's apartment and took a box of ammunition that had a few rounds missing, as well as the .45-caliber rounds that Sinclair had seen on the table the day before.

On November 1, 2007, police arrested defendant and his girlfriend, Wanda Mitchell, on outstanding felony warrants unrelated to the homicides. Early in November 2007, police executed a search warrant at the home of defendant's mother. Defendant's SUV was parked at her residence. The vehicle had plastic covering the seats. Defendant's mother said she had had the vehicle cleaned and the seats vacuumed and shampooed a few days before, on November 4.

The parties stipulated that defendant had a prior felony conviction.

### LEGAL ANALYSIS

#### 1.

### THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON SELF-DEFENSE AND IMPERFECT SELF-DEFENSE

#### *A. The Issue Is Cognizable on Appeal.*

Defendant relied on the defense of self-defense or, alternatively, of imperfect self-defense as to count 1, the murder of Raquel Robinson. He now contends that the self-defense and imperfect self-defense instructions were incomplete, ambiguous and

misleading for a number of reasons. He did not, however, request clarification or amplification of the instructions in the trial court.<sup>6</sup>

As general rule, a defendant's failure to request clarification or amplification of an otherwise correct instruction forfeits that claim on appeal. (*People v. Young* (2005) 34 Cal.4th 1149, 1203.) However, because defendant also asserts that defense counsel's failure to object or to request clarification deprived him of his constitutional right to the effective assistance of trial counsel, we will address the instructional issue on its merits.

### *B. Standard of Review*

An appellate court reviews the wording of a jury instruction de novo and assesses whether the instruction accurately states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) If the instruction is potentially misleading or ambiguous, the court inquires “whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.” [Citations.] “[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” [Citations.] The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury. [Citations.]” (*People v. Young, supra*, 34 Cal.4th at p. 1202.)

---

<sup>6</sup> The initial colloquy concerning the instructions on self-defense and imperfect self-defense appears on the record. There was no mention of the clarifications defendant now contends were necessary. The court concluded the colloquy by saying that further discussion would be held after both sides had rested. Later, the court stated that the subsequent discussion would be held in chambers off the record, but that the parties would have the opportunity to put any objections on the record. The subsequent record reflects no objections nor any further discussion concerning the instructions.

*C. The Instructions Were Legally Correct, and There Is No Reasonable Likelihood That the Jury Was Misled or Confused In the Manner Defendant Suggests.*

The court gave the standard instruction, CALCRIM No. 505, on self-defense. That instruction provides:

“The defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if:

“1. The defendant reasonably believed that he was in imminent danger of being killed or suffering great bodily injury;

“2. The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger;

“AND

“3. The defendant used no more force than was reasonably necessary to defend against that danger.

“Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of great bodily injury to himself. Defendant’s belief must have been reasonable and he must have acted only because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the killing was not justified.

“When deciding whether the defendant’s beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a

reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

"A defendant is not required to retreat. He is entitled to stand his ground and defend himself and, if reasonably necessary, to pursue an assailant until the danger of death or great bodily injury has passed. This is so even if safety could have been achieved by retreating.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"The People have the burden of proving beyond a reasonable doubt that the killing was not justified. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter."

The court then gave CALCRIM No. 3472, which provides: "A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force."

On imperfect self-defense, the court gave a modified version of CALCRIM No. 571:

"A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense.

"If you conclude the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete

self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

"The defendant acted in imperfect self-defense if:

"1. The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury;

"AND

"2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

"BUT

"3. At least one of those beliefs was unreasonable.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

"In evaluating the defendant's beliefs, consider all the circumstances as they were known and appeared to the defendant.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

*"However, this principle is not available if the defendant by his wrongful conduct created the circumstances which legally justified his adversary's use of force.*

"The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

The italicized paragraph is not part of the standard instruction on self-defense. The parties agree, however, that it is a correct statement of the law.<sup>7</sup> Defendant contends, however, that the court should have clarified the instructions by adding, “‘Where the original aggressor is not guilty of a deadly attack, but of a simple assault or trespass, the victim has no right to use deadly or other excessive force. . . . If the victim uses such force, the aggressor’s right of self-defense arises . . .’ [citation],” or by adding, “‘If, however, the counter assault be so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, if he cannot retreat with safety, then as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying, forthwith, in self-defense’ [citation].”

Defendant does not explain *why* these clarifying or amplifying instructions were necessary. In any event, these instructions were not supported by the evidence. They would have been appropriate if there had been evidence that defendant had committed a minor assault, to which Robinson responded with an attempt at deadly force. As defendant himself notes, however, “[Defendant’s] failure to pay Raquel the \$20 he owed

---

<sup>7</sup> The source of this paragraph is *In re Christian S.* (1994) 7 Cal.4th 768:

“It is well established that the ordinary self-defense doctrine—applicable when a defendant *reasonably* believes that his safety is endangered—may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary’s attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances. For example, the imperfect self-defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense.” (*Id.* at p. 773, fn. 1.)

her as change from an earlier drug transaction or his verbal quarrel with Raquel in Harris's residence did not amount to an initiation of a physical assault or the commission of a felony, within the meaning of [*In re Christian S.*, *supra*, 7 Cal.4th at p. 773, fn. 1].” An instruction should not be given unless there is substantial evidence from which the jury could reasonably conclude that the specific facts supporting the instruction existed. (*People v. Petznick* (2003) 114 Cal.App.4th 663, 677.) Because there was no evidentiary support for the instructions defendant now contends were necessary, their omission was not error.

Defendant goes on to contend that giving CALCRIM No. 3472 (“A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force.”) in combination with the portion of CALCRIM No. 571 which provides that self-defense “is not available if the defendant by his wrongful conduct created the circumstances which legally justified his adversary’s use of force” was misleading because, “[a]lthough as a convicted felon [defendant] engaged in felonious conduct by coming armed with a firearm to Harris’s residence, [defendant] did not, solely by reason of his unlawful conduct, forfeit his right to self-defense because Raquel was not entitled to respond to [his] wrongful conduct, by escalating the encounter and threatening and assaulting [him] with a box cutter and/or scissors.”

The problem with this contention is that there was no evidence that Robinson escalated the encounter by responding to defendant’s felonious conduct of arming himself with a firearm, because there was no evidence that Robinson *knew* he had a

firearm until he pulled it out and shot her as she was moving toward him. Moreover, neither attorney argued for that scenario. The prosecutor's position was that Williams's testimony showed that defendant was angry at being disrespected by Robinson, not that he was afraid she was about to assault him with a box cutter. With respect to self-defense, the prosecutor argued that defendant's use of force was disproportionate because Robinson did not pose any threat of death or serious injury because if she did have a box cutter in her hand, it was in her left hand, and Williams testified that Robinson reached toward defendant with her open right hand.<sup>8</sup> Moreover, Williams made it abundantly clear that she viewed Robinson as the instigator of the quarrel and that defendant did nothing but protest verbally about being disrespected until Robinson jumped to her feet the second time and moved toward defendant. Consequently, the record does not support the inference that jurors did or might have misapplied the instructions in the manner defendant suggests. (*People v. Young, supra*, 34 Cal.4th at pp. 1202-1203.)

Defendant also contends that CALCRIM No. 571 was ambiguous, incomplete and misleading because it does not define the terms "wrongful conduct" or "legally justified." ("However, this principle [i.e., imperfect self-defense] is not available if the defendant by his wrongful conduct created the circumstances which legally justified his adversary's use of force.") He contends that jurors could have interpreted this language to mean that Robinson was justified in assaulting him with a box cutter or scissors because he was "a

---

<sup>8</sup> In his reply brief, defendant asserts that the prosecutor conceded that Robinson had a box cutter in her hand when she charged at defendant. We do not see such a concession.

drug dealer who failed to pay her back her \$20, [and] because he became involved in a quarrel, verbal altercation, and physical confrontation with [Robinson].” Again, however, the prosecutor’s position was not that anything defendant did gave Robinson the legal right to assault him. Rather, his position was that defendant came to the house with the intent of killing Robinson because of her haranguing and disrespecting him over the trivial matter of \$20 owed to her. And, he argued that defendant’s use of force was disproportionate to any actual or perceived threat posed by Robinson. Moreover, CALCRIM No. 505 told the jury that self-defense is justified only when a person reasonably believes that he or she is in imminent danger of serious bodily harm or death. Accordingly, the jurors were aware that “wrongful conduct” which would “legally justify” the use of force would be conduct which caused the adversary to believe that he or she was in imminent danger of serious injury or death. They were also aware that trivial “wrongful conduct,” such as engaging in failing to repay a debt or engaging in a verbal altercation, would not legally justify self-defense.

Because neither the evidence nor the prosecutor’s theory of the case supported the inference defendant suggests, and because the instructions as a whole correctly informed jurors of the factual basis necessary to create a legal right to self-defense, there is no reasonable likelihood that the jurors were misled by the omission of definitions of “wrongful conduct” and “legally justified.”<sup>9</sup>

---

<sup>9</sup> Because we find no error in the jury instructions pertaining to count 1, we reject defendant’s contention that the errors also infected the verdict on count 2.

Accordingly, there was no error with respect to the instructions on self-defense and imperfect self-defense.

2.

THE OMISSION OF AN INSTRUCTION ON HEAT-OF-PASSION VOLUNTARY  
MANSLAUGHTER WAS NOT PREJUDICIAL

Defendant contends that the trial court was required to instruct on the lesser included offense of heat-of-passion voluntary manslaughter because “a reasonable juror could conclude based on the evidence that the homicide of [Robinson] was provoked and took place in [a] sudden quarrel and/or heat of passion.” Even if the instruction was warranted by the evidence, however, its omission was not prejudicial.

An intentional killing may be reduced from murder to voluntary manslaughter if there is evidence that the killing was committed without malice. Malice is presumptively absent when the defendant kills upon a sudden quarrel or in the heat of passion on sufficient provocation or in the unreasonable but good faith belief that deadly force is necessary in self-defense. (*People v. Manriquez* (2005) 37 Cal.4th 547, 583 (*Manriquez*).) In order to reduce a homicide from murder to voluntary manslaughter on a heat-of-passion theory, there must be substantial evidence that “““at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.”” [Citation.]’ [Citation.]” (*Id.* at p. 584.) Passion includes anger, rage, or any

“““[v]iolent, intense, high-wrought or enthusiastic emotion”” [citations],” except the desire for revenge. (*People v. Breverman* (1998) 19 Cal.4th 142, 163 (*Breverman*).) The passion must result from some provocation caused by the victim or reasonably attributed to the victim by the defendant. (*Manriquez*, at pp. 583-584.)

Heat-of-passion voluntary manslaughter has both an objective element and a subjective element: The defendant’s response to the provocation must be objectively reasonable, i.e., “““passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,” because “no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.” [Citation.]’ [Citations.]” (*Manriquez, supra*, 37 Cal.4th at p. 584.) And, the defendant must ““actually [and] subjectively”” be acting under the influence of the passion engendered by the provocation when he or she uses deadly force. (*Id.* at p. 585.)

As with any lesser included offense, a trial court must instruct on heat-of-passion voluntary manslaughter if there is substantial evidence which would rationally support a finding that the defendant is guilty only of that lesser offense and is not guilty of murder. (*Manriquez, supra*, 37 Cal.4th at p. 584.) “The trial court is not required to present theories [that] the jury could not reasonably find to exist.” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) On appeal we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense of

voluntary manslaughter should have been given. (*Manriquez*, at p. 584.) We view the evidence in the light most favorable to the defendant in determining whether substantial evidence supports giving the instruction. (*Breverman*, *supra*, 19 Cal.4th at p. 163.)

Here, defendant did not testify, and there was no other evidence, such as a police interview, which directly revealed defendant's mental state when he shot Robinson. Consequently, there is no direct evidence that defendant felt rage, fear or any other emotion which would show that he “‘actually, subjectively, kill[ed] under the heat of passion.’ [Citation.]” (*Manriquez*, *supra*, 37 Cal.4th at p. 585.) However, circumstantial evidence may nevertheless warrant an instruction on heat-of-passion voluntary manslaughter, even if the defendant denies committing the homicide, denies that he or she intended to kill, or testifies only that he or she acted in a perceived need for self-defense. (See *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016-1017, and cases cited therein; *Breverman*, *supra*, 19 Cal.4th at pp. 162-163.)

Defendant contends that the earlier confrontation between Robinson and defendant outside the house, Robinson's multiple telephone calls haranguing and threatening defendant, the continued verbal assault by Robinson when defendant came to the house, and Robinson's physically charging at defendant, all of which culminated in defendant's shooting Robinson, is sufficient evidence to warrant an instruction on heat-of-passion voluntary manslaughter. We agree, in part. Robinson's haranguing and insulting defendant was not sufficient provocation to invoke heat-of-passion voluntary manslaughter. Insults, such as calling the defendant a “mother fucker,” and taunting him

that if he had a weapon, he “should take it out and use it,” or calling the defendant a “faggot” and pushing him, have been held not to constitute provocation sufficient to cause an ordinary person of average disposition to lose reason and judgment under an objective standard. (*Manriquez, supra*, 37 Cal.4th at p. 586; *People v. Najera* (2006) 138 Cal.App.4th 212, 226.) Similarly, repeated telephone calls over a few hours, insults, unspecified threats and haranguing someone over a \$20 debt do not objectively suffice as provocation sufficient to cause an ordinarily reasonable person to lose reason and control. Even Robinson’s repeatedly insulting defendant by calling him “cuz” does not amount to sufficient provocation, even assuming he was indeed a Blood: The standard for legally sufficient provocation is the reasonable person, not the reasonable gang member. (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1087.)

Combined, however, with Robinson’s lunging at defendant, possibly with a box cutter in her hand, the circumstances arguably did warrant an instruction on heat-of-passion voluntary manslaughter. In *Breverman, supra*, 19 Cal.4th 142, the defendant was attacked by a group of young men, one of whom had been injured the day before in an altercation which took place in front of the defendant’s home and at which the defendant might have been present, although he denied having been involved in the altercation. (*Id.* at pp. 149-151.) As the court summarized it, the testimony of the defendant, as well as that of his mother and a friend who were both present, showed that a “sizeable group of

young men, armed with dangerous weapons<sup>[10]</sup> and harboring a specific hostile intent, trespassed upon domestic property occupied by [the] defendant and acted in a menacing manner. This intimidating conduct included challenges to the defendant to fight, followed by use of the weapons to batter and smash [the] defendant's vehicle parked in the driveway of his residence, within a short distance from the front door. [The] [d]efendant and the other persons in the house all indicated that the number and behavior of the intruders, which [the] defendant characterized as a 'mob,' caused immediate fear and panic." (*Id.* at p. 163.) The defendant, who testified that he thought he and his mother and his friend were going to be killed, responded by shooting out the front door, killing one of the assailants. (*Id.* at p. 151.) Although Breverman's defense was self-defense and defense of others, both actual and imperfect (*id.* at pp. 148), and he did not testify at the trial (*id.* at p. 151, fn. 3), the court held that "a reasonable jury could infer that [the] defendant was aroused to passion, and his reason was thus obscured, by a provocation sufficient to produce such effects in a person of average disposition." (*Id.* at pp. 163-164, fn. omitted.) The court held that, based on this evidence, the trial court had a sua sponte duty to instruct the jury on heat-of-passion voluntary manslaughter. (*Id.* at p. 164.)

*Breverman* differs from this case in that the circumstantial evidence which the court found to support the inference that the defendant acted in a heat of passion included

---

<sup>10</sup> At least 12 people and perhaps as many as 15 to 20, armed with "bats and chains and stuff," as described by the defendant. (*People v. Breverman, supra*, 19 Cal.4th at pp. 151-152.)

Breverman's own statement to the police, in which he described his "continuous, chaotic response to the riotous events outside his door." (*Breverman, supra*, 19 Cal.4th at p. 164, fn. omitted.) In this case, there is no equivalent evidence of defendant's mental state from which jurors could infer that he acted in a heat of passion. Nevertheless, the situation defendant faced—an enraged 280-pound woman launching herself toward him in a small, enclosed space, holding something that might have been a box cutter—was arguably sufficient to engender an emotional response which obscured his reason and caused him to act out of fear. However, even if we assume that the evidence does support that conclusion, the omission of a heat-of-passion voluntary manslaughter instruction was not prejudicial.

Omission of a jury instruction on a lesser included offense requires reversal if an examination of the entire record establishes a reasonable probability that the error affected the outcome of the trial. (*Breverman, supra*, 19 Cal.4th at pp. 165-178.) Here, it is not reasonably probable that the jury would have returned a verdict of heat-of-passion voluntary manslaughter if the instruction had been given. The jury was instructed that if defendant reasonably feared that he was in danger of imminent bodily injury or death, the homicide was justifiable, and that if he unreasonably acted out of that fear, the homicide was voluntary manslaughter on an imperfect self-defense theory. Thus, the precise factual scenario which defendant posits as the basis for the heat-of-passion instruction, i.e., that he shot Robinson out of fear for his safety, either reasonably or unreasonably, was rejected by the jury under the self-defense and imperfect self-defense instructions.

In addressing a similar claim, the California Supreme Court observed, “Once the jury rejected defendant’s claims of reasonable and imperfect self-defense, there was little if any independent evidence remaining to support his further claim that he killed in the heat of passion, and no direct testimonial evidence from defendant himself to support an inference that he *subjectively* harbored such strong passion, or acted rashly or impulsively while under its influence for reasons unrelated to his perceived need for self-defense. . . . [¶] Moreover, the jury having rejected the factual basis for the claims of reasonable and unreasonable self-defense, it is not reasonably probable [that] the jury would have found the requisite *objective* component of a heat of passion defense (legally sufficient provocation) even had it been instructed on that theory of voluntary manslaughter.” (*People v. Moye* (2009) 47 Cal.4th 537, 557.) For the same reason, the omission of a heat-of-passion instruction was not prejudicial in this case.

In a related argument, albeit under a separate heading, defendant contends that reversal of both counts of murder is required because the court failed to instruct the jury that malice aforethought, an essential element of first degree murder, is “a specific intent to kill in the absence of sudden quarrel, heat of passion and imperfect self-defense.” He contends that the omission of an instruction fully informing the jury of the meaning of malice aforethought is subject to review under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24, i.e., that reversal is required unless the court can conclude that the error was harmless beyond a reasonable doubt. He contends that under this standard,

the omission of an instruction in this case which “fully defined” malice aforethought requires reversal of both murder counts.

Defendant relies on *People v. Rios* (2000) 23 Cal.4th 450. In that case, the court addressed the contention that in a trial in which voluntary manslaughter is the charged offense, the instructions were “prejudicially incomplete because they omitted the voluntary manslaughter ‘elements’ that the killing must have occurred in a heat of passion upon sufficient provocation (hereafter heat of passion or provocation), or in the actual but unreasonable belief in the need for self-defense (hereafter imperfect self-defense).” (*Id.* at p. 454.) “In effect, defendant urges that if the jury believed he committed an intentional, unlawful killing, without provocation or belief in the need to defend himself, it must acquit him of voluntary manslaughter.” (*Ibid.*) The court rejected that argument, holding that where the charged offense is murder, the prosecution may have to prove the absence of provocation or the erroneous belief in the need for self-defense in order to prove malice, but that where the charged offense is voluntary manslaughter, malice is not at issue and the prosecution must prove only that the homicide was unlawful and unintentional. (*Ibid.*)

Defendant implies that the court held that a murder instruction is always incomplete unless it defines malice as excluding heat of passion or imperfect self-defense. This is not correct. Rather, the court made it clear that such an instruction is required only in a murder trial where the evidence warrants an instruction on voluntary manslaughter as a lesser included offense. In that circumstance, the court held, the trial

court must instruct that provocation or imperfect self-defense negates malice and reduces the offense to voluntary manslaughter. (*People v. Rios, supra*, 23 Cal.4th at p. 463, fn. 10.) Accordingly, to say, as defendant does, that the court erroneously failed to instruct that malice is the intent to kill in the absence of sudden quarrel or heat of passion is merely a recasting of defendant's previous argument that an instruction on heat-of-passion voluntary manslaughter was required because it was warranted by the evidence. It is not a new or different issue. Moreover, the omission of an instruction explicitly stating that malice aforethought requires the absence of heat of passion or imperfect self-defense does not affect the jury's deliberations on first or second degree murder; it only affects their deliberations on voluntary manslaughter. Consequently, the absence of the instruction is irrelevant to the murder convictions.

Defendant apparently raises this issue separately in order to argue that the omission of the heat-of-passion instruction is subject to review under *Chapman v. California, supra*, 386 U.S. 18. However, in *Breverman*, the California Supreme Court held that the failure to instruct sua sponte on a lesser included offense in a noncapital case is, "at most, an error of California law alone, and is thus subject only to state standards of reversibility." (*Breverman, supra*, 19 Cal.4th at p. 165.) The court expressly "reject[ed] any implication" that the failure to instruct sua sponte on an uncharged lesser included offense, "or any aspect thereof," "is one which arises under the United States Constitution." (*Ibid.*) We, of course, are bound by *Breverman (Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and we reject defendant's contention.

3.

THE OMISSION OF AN INSTRUCTION CONCERNING A THIRD PARTY'S  
SUPPRESSION OF EVIDENCE AS EVIDENCE OF CONSCIOUSNESS OF GUILT  
DOES NOT REQUIRE REVERSAL OF THE MURDER CONVICTIONS

Defendant contends that both murder convictions must be reversed because the court failed to instruct on the principles of law governing a third party's concealment or destruction of evidence.

The issue arose as follows. The prosecutor introduced evidence that a couple of days after the homicides, defendant's mother removed some items from defendant's apartment. The manager of the apartment complex, Shawn Sinclair, testified that he saw her remove a box containing bullets and some additional bullets from a table in the apartment. Sinclair testified that the bullets in the box looked like .45-caliber bullets. The casings retrieved from Harris's bedroom were from .45-caliber bullets. The prosecutor also introduced evidence that when police executed a search warrant on defendant's mother's residence on November 4, 2007, defendant's white SUV was parked by the residence. There was plastic covering the interior of the vehicle, and defendant's mother told the investigator that she had had the vehicle shampooed and vacuumed a few days earlier. In his closing argument, the prosecutor argued that defendant's flight after the homicides and his mother's actions were "[a]ll the actions of a guilty man."

The court instructed the jury, using CALCRIM No. 371, as follows: “If the defendant tried to hide evidence, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.” Defendant contends the court should also have instructed that efforts of a person other than defendant to conceal or destroy evidence could also show consciousness of guilt, but only if defendant was either present and knew about those actions or authorized the other person’s actions.<sup>11</sup> He concedes that he did not request that instruction, but contends that even if there is normally no sua sponte duty to instruct on third-party suppression of evidence, the court was required in this instance to do so because, having given the portion of CALCRIM No. 371 which applies to a defendant’s own efforts to suppress evidence, the court was obligated to complete the instruction with respect to his mother’s efforts to suppress evidence. He contends that the instruction as given implies that he instigated his mother’s actions.

We view the issue differently than does defendant. Evidence of concealment or destruction of evidence is admissible only to support an inference that the defendant harbored a consciousness of his or her guilt. (*People v. Hannon* (1977) 19 Cal.3d 588,

---

<sup>11</sup> CALCRIM No. 371 also states, “If someone other than the defendant tried to . . . conceal or destroy evidence, that conduct may show the defendant was aware of his guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person’s actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself.”

597-598, disapproved on another point in *People v. Martinez* (2000) 22 Cal.4th 750, 761-763.) In order to justify a consciousness of guilt instruction based on the efforts of a person other than the defendant to suppress evidence, there must be evidence not only that the person did so, but also that the defendant knew of and authorized or sanctioned the other person's acts. (*People v. Hannon, supra*, at pp. 599-600.) Similarly, to justify a consciousness of guilt instruction based on the defendant's efforts to suppress evidence, there must be evidence that the defendant did so. (*Ibid.*)

In this case, there was no evidence that defendant himself attempted to suppress evidence, and there was no evidence that defendant knew of and authorized his mother's efforts to sanitize his SUV. Because there is no evidentiary basis for an instruction on suppression of evidence, either by defendant himself or by another person on his behalf, it was error to give CALCRIM No. 371 at all. The error would not have been cured by giving the additional instruction that defendant now contends should have been given.

In any event, neither omitting the third-party suppression of evidence instruction nor giving the instruction as it pertained to defendant's own (nonexistent) efforts to suppress evidence requires reversal. Defendant argues that the instruction deprived him of his constitutional right to have the jury determine every material issue presented by the evidence and resolve disputed factual issues, and therefore must be reviewed for harmless error under *Chapman v. California, supra*, 386 U.S. 18. Under that test, an instructional error requires reversal unless the reviewing court can say beyond a reasonable doubt that the error did not contribute to the verdict. (*People v. Flood* (1998) 18 Cal.4th 470, 504.)

We disagree that this is the applicable standard. Although it is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case, the error does not, in general, violate the federal Constitution. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130.) In any event, the error was harmless under either a *Chapman* standard or a *Watson* standard.<sup>12</sup>

Here, the evidence that defendant shot and killed two people was overwhelming and was not contested by the defense. Rather, he contended that he acted in self-defense or imperfect self-defense. Consciousness of guilt is at most marginally relevant to whether a killer acted with or without deliberation and premeditation, or whether he or she acted in self-defense. We are convinced beyond a reasonable doubt that the instructional error defendant asserts did not contribute to the guilty verdicts. Any error in the consciousness of guilt instruction was also not prejudicial under California's *Watson* test for prejudice, i.e., that there is no reasonable probability that the outcome would have been more favorable to defendant in the absence of the error. (*People v. Flood, supra*, 18 Cal.4th at p. 490.)

---

<sup>12</sup> *People v. Watson* (1956) 46 Cal.2d 818, 836.

4.

DEFENDANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF TRIAL  
COUNSEL

Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 684-685 (*Strickland*) [discussing federal constitutional rights]; *People v. Pope* (1979) 23 Cal.3d 412, 422 [discussing both state and federal constitutional rights].) If trial counsel's representation falls below prevailing professional standards of competence and there is a reasonable probability that the outcome of the trial would have been more favorable to the defendant in the absence of the deficiency in counsel's performance, the conviction must be reversed. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; *Strickland*, at pp. 687, 693-694.) The defendant bears the burden of demonstrating both that counsel's performance fell below prevailing standards and that prejudice resulted. (*Strickland*, at p. 689.)

Defendant makes two separate claims of ineffective assistance of counsel.

Defendant first asserts that his trial attorney's failure to "ensure that the trial court properly instructed the jury on self-defense and voluntary manslaughter as well as the principles of law governing a third party's concealment or destruction of evidence" deprived him of his constitutional right to the effective assistance of trial counsel.

Ineffective assistance of counsel claims are generally not cognizable on appeal if counsel might have had a rational tactical reason for his or her acts or omissions which is not apparent from the record. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Here, defendant asserts that trial counsel simply could not have had a rational tactical basis for his asserted failures. Even if we accept that assertion, defendant's claim fails because he has not demonstrated prejudice from any of these asserted failings. We found that the self-defense instruction was neither incorrect nor incomplete or misleading. Consequently, no clarification was required, and counsel's failure to seek clarification was neither deficient performance nor prejudicial. We found that while the evidence supported an instruction on heat-of-passion voluntary manslaughter, the omission was not prejudicial. Accordingly, counsel's failure to seek the instruction or argue the theory was also not prejudicial. In the absence of prejudice, a claim of ineffective assistance of trial counsel fails. (*Strickland, supra*, 466 U.S. at pp. 687, 697.) Similarly, any error in connection with CALCRIM No. 371 was harmless, and counsel's failure in that respect was also not prejudicial.

Under a separate heading, defendant contends that his attorney rendered ineffective assistance because he failed to object to "unduly prejudicial evidence that [defendant] was a gang member and that he had committed another felony crime."

As to the first contention, the evidence of defendant's gang membership consisted solely of Williams's testimony that she *thought* defendant was "a Blood ex-gangbanger," and that as a Blood, he would find it insulting to be addressed as "cuz." Williams

expressly stated that she did not *know* whether defendant was or had been a Blood.

Ineffective assistance of counsel claims based on failure to object to evidence are rarely cognizable on appeal because there are many instances in which it is a rational choice of trial tactics not to object even if the objection might be successful. (*People v. Riel* (2000) 22 Cal.4th 1153, 1202-1203.) Here, defendant's attorney could have made the rational decision not to object in order to avoid highlighting the issue, especially since Williams conceded that she did not know whether defendant was a gang member. Because the record is silent as to counsel's reason for not objecting, the issue must be raised, if at all, via a petition for a writ of habeas corpus. (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.)

Defendant's second contention is based on Investigator Patterson's testimony that on November 1, 2007, defendant and his girlfriend "both had outstanding felony arrest warrants, not involving this case, that they were arrested for." Again, defense counsel could have rationally decided not to object in order to avoid highlighting the implication. Moreover, the jury had already been informed that defendant was a drug dealer who routinely sold drugs to both Harris and Robinson, and at the end of trial, they were informed that as of the date of the homicides, defendant had one prior unspecified felony conviction. The additional information that there was an outstanding felony warrant for his arrest—not a prior felony conviction, as defendant's argument implies—was not of such great significance that there is a reasonable probability that he would not have been convicted of first degree murder if the evidence had not been admitted.

5.

DEFENDANT WAS NOT PREJUDICED BY CUMULATIVE ERROR

Defendant contends that even if the multiple errors he asserts were not individually reversible, their cumulative effect “irreparably prejudiced” his right to a fair trial. We found no error with respect to the instructions on self-defense and imperfect self-defense, no ineffective assistance of counsel, and no prejudicial error with respect to the omission of an instruction on heat-of-passion voluntary manslaughter or as to the consciousness of guilt instruction. Defendant has failed to persuade us that the two nonprejudicial errors had any cumulative effect. (Cf. *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [“constant and outrageous” prosecutorial misconduct, which permeated the entire trial, combined with other errors, caused cumulative prejudice sufficient to deny defendant a fair trial].)

6.

THE SENTENCE MUST BE MODIFIED

Defendant was charged with the special circumstance of multiple murders. The jury found that allegation true. The court imposed a sentence of life without the possibility of parole (LWOP) for the special circumstance, and imposed a separate, consecutive term of 25 years to life for each of the two murder convictions. Arguing that the multiple murder enhancement was “attached” to count 2, defendant contends that the 25 years to life sentence on count 2 amounted to double punishment and that only the LWOP term should have been imposed on count 2. He contends that this is an

unauthorized sentence, and asked us to correct it. The Attorney General agrees. We agree that the sentence is unauthorized, but for different reasons.

Section 190.2, subdivision (a)(3) provides for a term of LWOP in a case in which the defendant has been convicted of first degree murder and has also been convicted in the same proceeding of more than one offense of murder in the first or second degree. No matter how many murder charges are tried together, only a single multiple murder special circumstance may be alleged. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1150, superseded by statute on another point as recognized in *People v. Letner and Toben* (2010) 50 Cal.4th 99, 163, fn. 20.) However, the special circumstance applies to *each* murder count for which the defendant was convicted, and the LWOP sentence must be applied to each count. (*People v. Garnica* (1994) 29 Cal.App.4th 1558, 1563-1564 [Fourth Dist., Div. Two].) There is no statutory authority to impose an LWOP term for the special circumstance itself, as the trial court did in this case. Accordingly, this sentence was unauthorized and must be corrected. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

### DISPOSITION

The terms of 25 years to life imposed on counts 1 and 2 are stricken, as is the term of life without the possibility of parole imposed for the special circumstance. The superior court is ordered to impose instead a term of life without the possibility of parole on count 1 and a term of life without the possibility of parole on count 2. The sentence is otherwise affirmed. The superior court shall amend both the abstract of judgment and the sentencing minutes accordingly, and shall, within 30 days after the finality of this opinion, forward a copy of the amended abstract of judgment and amended sentencing minutes to the Department of Corrections and Rehabilitation and to the parties.

The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER  
J.

We concur:

HOLLENHORST  
Acting P. J.  
KING  
J.